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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE BAUTISTA MIRANDA,

Defendant and Appellant.

G036005

(Super. Ct. No. 03WF1329)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas J. Borris, Judge. Affirmed.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Scott C. Taylor and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Jorge Bautista Miranda of possession for sale and transportation of more than 28.5 grams of methamphetamine. The court suspended imposition of sentence and placed defendant on probation for three years.

On appeal, defendant contends the prosecutor committed prejudicial misconduct by improperly vouching for the credibility of one prosecution witness during the prosecutor's redirect examination of that witness and during closing argument. In addition, because defendant's trial counsel failed to object to the prosecutor's questioning and argument, defendant also contends he received ineffective assistance of counsel. We find these contentions without merit and affirm the judgment.

## I

### FACTS

One evening in May 2003, at around 6:45 p.m., while Garden Grove Police Officer Allan Harry was on routine patrol, he stopped a truck for obstructed rearview and sideview mirrors. The driver, Juan Delatorre, initially gave Harry a false name and did not have a valid driver's license. Defendant, the passenger and the truck's owner, gave Harry his true name and a valid driver's license which been issued under his name, but he did not have the actual license on his person. Harry arrested defendant and Delatorre and performed patdown searches of both individuals. Defendant was carrying \$250 in cash and Delatorre had \$524. Harry impounded defendant's truck, had it towed to the Garden Grove Police Department, and he and another officer conducted an inventory search. The truck was loaded with numerous items used in defendant's line of work as a flooring installer, including rolls of carpet and carpet padding, a vacuum cleaner, and tools. The officers also found a large white baggy containing approximately 43.3 grams of methamphetamine wrapped in a dirty white rag stuffed inside the top compartment of the passenger's side utility box.

Harry and Garden Grove Police Officer Ed Leiva interviewed defendant at the police station. Leiva testified defendant said he had known Delatorre for about 15

years before their arrest. He told the officers Delatorre offered to pay him \$500 for the temporary use of his truck. Defendant denied having any knowledge of the drugs concealed in the truck's utility box. However, defendant did say Delatorre showed him a white plastic bag containing a white powder, but defendant thought it was cocaine not methamphetamine. Later in the interview, defendant explained "that Delatorre [] said he was going to do a drug deal" and the \$500 he would pay defendant for the use of his truck were part of the proceeds from the deal. Leiva stated defendant was cooperative during the interview. He denied threatening defendant or making any promises to coerce defendant's statement.

On the other hand, defendant testified Leiva pressured him throughout the interview. He said he felt ashamed and even cried at times. He denied knowing anything about the drugs in his truck and said he did not tell Leiva he was helping Delatorre complete a drug transaction. He also explained that the officers, not Delatorre, had shown him the white plastic bag and asked what the substance was inside it. It was at this point defendant responded with, "I don't know, cocaine, or something. I don't know."

Defendant explained that he had asked Delatorre for a loan to help him pay the rent. Delatorre agreed to help defendant on the condition defendant let him borrow the truck. Defendant said his wife did not want him to let Delatorre borrow the truck, but he decided to go "behind [his] wife's back" and lend Delatorre the truck anyway. Delatorre came to his house around 4:00 p.m. to borrow the truck. Defendant decided he should go with Delatorre. As they were driving, Delatorre told defendant he needed to stop at a hotel so that he could pick up some money. Defendant did not know Delatorre's license was invalid and did not know what Delatorre intended to do. Defendant said he had \$250 in cash because he had earned the money working that day. Delatorre came to his house at around 4:00 p.m. and they were arrested at 6:30 p.m., but defendant could

not account for the approximately two and one-half hours between the time Delatorre picked him up and the arrest.

Defendant's wife testified. She confirmed her husband's testimony that Delatorre had offered to loan him \$500 for the use of his truck. However, she contradicted defendant's testimony that they needed the money for rent. She confirmed that they had known Delatorre for about 15 years. She also confirmed that he arrived at their house that day at around 4:00 p.m.

## II

### DISCUSSION

Defendant contends the prosecutor improperly vouched for Leiva's credibility during the prosecutor's redirect examination and closing argument. He asserts the prosecutor thereby violated his state and federal Constitutional right to a fair trial. Defendant acknowledges his trial counsel failed to object to the purported misconduct at trial, but contends this court should consider the claim on the alternative ground of ineffective assistance of counsel and its concomitant denial of his state and federal Constitutional right to counsel. We find no prosecutorial misconduct and therefore no ineffective assistance of counsel.

“‘The applicable federal and state standards regarding prosecutorial misconduct are well established. “‘A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so “egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.”’” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.’”’ [Citation.]” (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

Generally speaking, “A prosecutor may make ‘assurances regarding the apparent honesty or reliability of’ a witness ‘based on the “facts of [the] record and the

inferences reasonably drawn therefrom.” [Citation.] But a ‘prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record.’ [Citation.]” (*People v. Turner* (2004) 34 Cal.4th 406, 432-433.) Reviewing the pertinent portions of the record, we conclude the prosecutor did not refer to evidence outside of the record or personally vouch for Leiva’s credibility.

Defense counsel had emphasized the fact that Leiva had not recorded defendant’s interview something Leiva testified he reserved for more serious crimes due to logistical problems with the recording equipment. At one point, defense counsel stated to Leiva, “it’s basically just your word against the defendant’s because you don’t tape it . . . .” Leiva agreed, and responded, “If there was an easier process for us, and I wish the police department made it easy, I would do [record] all of them.”

On redirect, the prosecutor engaged Leiva in the following colloquy: “[The prosecutor]: Investigator Leiva, during this interview you read the defendant — you went through the *Miranda* rights, correct? [¶] A. Yes. [¶] Q. And are you lying to this jury in any way about what Mr. Miranda told you — [¶] A. No. [¶] Q. — During that interview? [¶] A. No. [¶] Q. [¶] Do you have any reason to make up any stories or any statements by the defendant for this jury? [¶] A. No. [¶] [The prosecutor]: Nothing further, your Honor.”

When viewed in context, the prosecutor’s questioning on redirect amounts to nothing more than permissible witness rehabilitation. Defense counsel’s cross-examination suggested Leiva failed to record defendant’s interview for nefarious reasons. The prosecutor is allowed to counter defense challenges to the credibility of a witnesses on redirect examination. (See *People v. Arias* (1996) 13 Cal.4th 92, 186; see also *People v. Rich* (1988) 45 Cal.3d 1036, 1093.) There is nothing improper in the two questions the prosecutor posed to Leiva during redirect examination.

We reach the same conclusion with respect to the prosecutor's statements during closing argument. The pertinent portion of the prosecutor's closing argument focused on the credibility of the two main witnesses, defendant and Leiva. The prosecutor stated, "The defendant's own words. Again, he tells the officers at first — or Investigator Leiva that he knows nothing about the drugs. He tells him the wife told him not to lend the car. He also said — and I've written down these notes; I was reviewing it the last couple of minutes — but Investigator Leiva told you that Mr. Miranda told him that he had know Mr. Delatorre for 15 years. That is substantiated by Ms. Miranda's testimony today, although I asked Mr. Miranda that question three or four times. Notice he didn't want to answer it. He always answered my questions with questions most of the time this morning. [¶] Note his attitude on the stand. Now I know, ladies and gentlemen, that there was an interpreter being used this morning. I'm not insensitive to that fact. I know it's different when you're going through an interpreter. However, the questions were sometimes asked two or three times and he still refused to answer things yes or no when it was a yes-or-no question. [¶] That's one thing you need to consider, the credibility of the witnesses. . . . 'Cause somebody is not telling the truth, right? [¶] Two contradictory statements, two contradictory stories. Somebody is not telling the truth. Just based on their words, their actions why they might have a reason to lie, those are all factors for you to consider."

The prosecutor pointed out several inconsistencies in defendant's testimony and then turned his attention to Leiva's testimony. The prosecutor argued, "If the officer is lying, okay, if you think Investigator Leiva came in here to put his career on the line and his livelihood, ladies and gentlemen, if you think he's a liar, why wouldn't he just make the laws a little bit better for us all? Why wouldn't he just make it air tight and say, 'You know what? I found the drugs in Miranda's pocket. He told me he was on his way to go to the drug deal himself. He told me the other guy didn't have anything to do with

it.’ [¶] How about that? If he’s such a liar, why wouldn’t he say that just to seal it all up air tight? If you’re going to lie, do it right.”

Defendant contends the prosecutor improperly vouched for Leiva’s credibility by referring to his livelihood and career and asking the jury to think about him being a better liar if he is a liar. However, remarks of a more seemly nature were found to not constitute misconduct in *People v. Anderson* (1990) 52 Cal.3d 453 (*Anderson*).

In *Anderson, supra*, 52 Cal.3d 453, the California Supreme Court stated, “At one point in her argument, the prosecutor remarked that, ‘A law enforcement officer is no good as a witness if his credibility is in doubt,’ and in essence supported the credibility of the officers testifying in this case by noting that ‘a number of them . . . are old, experienced officers. They’ve got 15, 20, 22 years of experience on the force.’ The prosecutor expressed her doubt that any of them would ‘jeopardize’ his reputation by lying on the witness stand ‘just to convict one defendant.’ The prosecutor continued by noting that defendant, on the other hand, would only be testifying once, rather than a number of times, that he ‘doesn’t have anything else to lose,’ and ‘so what if you do catch him in a few lies?’” (*Id.* at p. 478.) The court found these statements were not misconduct because “the prosecutor limited her remarks to *facts of record*, namely, the years of experience of the officers involved, and her ‘vouching’ was clearly based on inferences reasonably drawn therefrom, rather than on her personal belief or knowledge. [Citation.]” (*Id.* at p. 479.)

Here, the prosecutor did not make personal assurances of Leiva’s credibility. The remarks were a reasonable response to defense counsel’s closing argument. Defense counsel had argued, “I think it’s pretty clear-cut what’s going on here. My client, Mr. Miranda, did not know those drugs were in the car and it’s as simple as that. In order for you to come back with a guilty verdict, you have to say and be able to look back on this case a year from now and still believe that Mr. Miranda, who you saw this morning on that stand, was lying to you beyond a reasonable doubt. That’s what

you have to believe in order to convict him. [¶] In a situation where you have two people saying different things, Investigator Leiva and Mr. Miranda, it's not a 'Well, you know, I'm not sure. Well, you know, he is a police officer and why would he, you know, make this up? What does he care?' Or, you know, 'And he's charged with a crime so, you know, that does give him a reason to lie. But, you know, he seemed pretty credible and believable but, you know, I'm not sure. I'll go with the investigator.' [¶] It doesn't work that way. It doesn't work that way in any criminal case for one reason. In order for you to convict, you need to find Mr. Miranda guilty of his crime beyond a reasonable doubt. And beyond a reasonable doubt means that you have to believe that he was lying beyond a reasonable doubt."

After a few minutes on the burden of proof, defense counsel returned to the issue of the tape recording: "As far as Investigator Leiva's testimony, just one four-letter word kept on coming to my mind. T-A-P-E. Why didn't he tape it? He stated, well, our equipment is from 1950. It's in another room. And the place where the tape recorder is set up, it's used for heavier cases like murders, such and such. [¶] When we're talking about a person's liberty here, how hard is it to go down to Target and buy a tape recorder, especially when you consider his testimony that hundreds of times he has been questioned by the defense regarding statements made, either they were inaccurate, they weren't true. Hundreds of times he's had to defend himself."

Viewed in context, the prosecutor's response to defense counsel's repeated attacks on Leiva's credibility was reasonable. The prosecutor did not refer to facts outside the record or his personal knowledge of the case, nor did he make personal assurances of Leiva's credibility. What the prosecutor did was argue a reasonable inference from the evidence, i.e., if Leiva did not record defendant's interview because he is willing to fabricate evidence for the prosecution, why did he not fabricate something better? Leiva's career was a matter of record. He testified to his length of service and experience prior to his testimony regarding defendant's interview. Based on our review



of the record, the prosecutor did not improperly vouch for Leiva's credibility and we reject defendant's argument to the contrary.

Defendant's reliance on *U. S. v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, is misplaced. In *Weatherspoon*, the prosecutor began argument with a personal assurance the police officers were "credible" police officers. (*Id.* at p. 1146.) During rebuttal, the prosecutor continued the theme by telling the jury, "They had no reason to come in here and not tell you the truth. And they took the stand they told you the truth. I guess, if you believe Mr. Valladeres [defense counsel], they must have lied at the scene there; they came into this court and they lied to you; they lied to this judge; they lied to me; they lied to my agent, Agent Baltazar. I guess they lied to the dispatcher when they called it in. These are officers that risk losin' their jobs, risk losin' their pension, risk losin' their livelihood. And, on top of that if they come in here and lie, I guess they're riskin' bein' prosecuted for perjury. Doesn't make sense because they came in here and told you the truth, ladies and gentlemen." (*Ibid.*)

There is a qualitative difference between the prosecutor's statements in *Weatherspoon*, *supra*, 410 F.3d 1142, and those made by the prosecutor here. We are not presented with a prosecutor's repeated personal assurances of Leiva's veracity, or a heavy-handed recitation of how many people he would have had to deceive to get defendant to trial, let alone convicted, or a laundry list of possible legal and professional repercussions Leiva was willing to risk just to get a conviction. In this case, defendant focuses on the prosecutor's brief reference to Leiva's career and livelihood, but ignores his own trial counsel's arguments, which in large part prompted the prosecutor justified responses. When viewed in context, the prosecutor's isolated references to Leiva's career and livelihood do not amount to improper argument.

Having rejected defendant's claim of prosecutorial misconduct it is axiomatic that defendant's ineffective assistance of counsel claim must also fail. Defense counsel is not required to make unnecessary objections or motions merely to create a self-

protective trial record. (*People v. Maury* (2003) 30 Cal.4th 342, 420.) Defendant's trial counsel need not have objected on the grounds of prosecutorial misconduct to the two questions posed by the prosecutor to Leiva during redirect examination, nor did he need to object to the prosecutor's statements regarding Leiva's career, livelihood, or his invitation to the jury to judge the Leiva's credibility. We find no error under state law and no violation of defendant's federal Constitutional right to counsel or to a fair trial.

### III

#### DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.